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No. 00-1514

In the Supreme Court of the United States

Lance Raygor and James Goodchild,

Petitioners,

v.

Regents of the University of Minnesota,

Respondent.

ON WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

REPLY BRIEF FOR PETITIONERS

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I. INTRODUCTION

Respondents do not identify any injury that was occasioned by the claimed violation of the university's sovereign immunity. Under *Pennhurst State School Hospital v. Halderman*, 465 U.S. 89 (1984)(*Pennhurst II*), a state is accorded the constitutional prerogative to object to defending a state law claim in federal court. That prerogative has been respected in this case; when the university filed a timely motion seeking dismissal of the MHRA claim, the district court promptly granted its request. The first action raising the MHRA claim was filed within the requisite 45 day period; there is no assertion that the university's ability to collect or preserve evidence was in any way affected by the date on which the second action was begun. Although the MHRA claim was initially commenced in federal court, that was a necessary part of a legal regime which affords state agencies the ability to decide whether such claims will be heard in federal or state court. Had the university wished to do so, it could within a few weeks of the original federal action have forced the refiling of the state claim simply by making a motion to dismiss that supplemental claim.

The only practical consequence of the operation of section 1367 in this case was that university lawyers, in order to exercise the defendants' prerogatives under *Pennhurst II*, were required to file in federal court a motion to dismiss the MHRA claim. That portion of the university's July 1997 motion was a mere eight sentences long.[1] The necessity of filing such a request had no impact on the assets of the university, and cannot plausibly be characterized as an affront to the dignity of the state of Minnesota.

[1] Defendant's Memorandum of Law In Support Of Its Motion to Dismiss, pp.8-9.

II. THE SOVEREIGN IMMUNITY OF THE STATES IS A CONSTITUTION-BASED DEFENSE, NOT A LIMIT ON THE SUBJECT MATTER JURISDICTION OF FEDERAL COURTS

The sovereign immunity accorded to the states by the Constitution is not an absolute prohibition against actions in federal courts against states; it applies only to nonconsenting states. Thus sovereign immunity is (where applicable) a defense which a state agency in its discretion may invoke in those cases where it objects to the exercise of federal jurisdiction over a particular claim. If the Eleventh Amendment or sovereign immunity placed claims against states outside the subject matter jurisdiction of federal courts, state defendants could not by consent confer such jurisdiction on those courts. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986).

The same principles apply to supplemental claims based on state law. *Pennhurst II* does not hold that supplemental claims against state agencies are outside the subject matter jurisdiction of federal courts. *Pennhurst II* merely accords to state agencies a right, which they may or may not elect to exercise, to insist that federal courts dismiss such supplemental claims.

The amicus states correctly observe that lawyers for state defendants routinely make case-by-case decisions regarding whether or not to assert sovereign immunity in federal actions. (Brief of States of Maryland, et al., p. 15)("States Amicus Br."). The United States explains why state attorneys often conclude that the interests of a state defendant are best served by not asserting sovereign immunity to bar a particular supplemental claim. (U.S.Br. 18). Even where an action involving federal and state claims has initially been filed in state court, state attorneys at times conclude that the

defendant's interests would be best served by removing the case to and trying it in federal court.[2]

A state which wants a district court to dismiss a claim based on sovereign immunity must ordinarily file a motion under the Rule 12(b)(6), as the university did in July 1997. *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 389 (1998). A state agency's decision not to file such a motion at the very outset of the litigation does not forfeit its sovereign immunity; the Federal Rules themselves set no deadline for such a dispositive motion, although a pre-trial order may well do so. But at least until (and unless) such a motion is filed, a state agency stands before the federal court like any other defendant, and remains within its authority.

A timely meritorious motion to dismiss on sovereign immunity grounds will compel the federal court to dismiss the claim in question. But such a motion does not operate retroactively to vitiate the court's earlier jurisdiction over the claim. (If, for example, a claim had been tried to judgment, a state agency could not invoke its immunity after-the-fact to invalidate that judgment). And such a motion does not mean that the filing of the original complaint, although entirely permissible at the time, becomes nunc pro tunc improper.

The United States properly acknowledges that section 1367(d) would (and could constitutionally) apply to this case if the university attorneys had initially consented in some express manner to the exercise of federal jurisdiction, and had only later revoked that consent.

> [E]ven if the State subsequently revokes its consent, and thereby forces the plaintiff to refile the state-law claim in state court, the revocation may not apply

[2] Attorneys for the University of Minnesota did that, for example, in *McDonell v. University of Minnesota Hospital and Clinic*, No. 96-CV-662 (D.Minn.) and *Dell v. University of Minnesota*, No. 93-CV-501 (D.Minn.).

> retroactively; Section 1367(d) may toll the limitations period for the period during which the case remained in district court with the State's consent.

(U.S. Br. 18). In this case the university took a slightly different approach, making no effort to obtain dismissal of the supplemental claim until it concluded, ten months after the filing of the complaint, that dismissal would be in its interests.[3] That difference is without legal or constitutional significance. The rights afforded to petitioners by section 1367(d) attached when the complaint was initially filed, and were not retroactively extinguished by respondents' subsequent motion to dismiss.

Congress can establish reasonable regulations of the process under which a state opts to exercise in federal court its right to assert its sovereign immunity defense. Section 1367(d) merely assures that state agencies will not derive an unfair advantage from a system which affords the states themselves ultimate control over whether supplemental state law claims will be heard in federal or state court. (See Pet. Br. 32-36). The operation of section 1367(d) is no different in practice than an order, similar to those issued by federal courts prior to the enactment of section 1367(d), forbidding attorneys for the university from asserting a statute of

[3] The university emphasizes that it did refer to the Eleventh Amendment in its answer. But this merely served to protect the university from an argument that it had waived that defense. *See* F.R.Civ. Pro. Rule 8(c). The answer did not specify which claims it contended were barred by that defense. (Pet. Br. 4).

In the federal courts a defendant which wants the court to dismiss a claim must ordinarily file a motion requesting that action. The university does not suggest that the district judge somehow erred in not dismissing the supplemental claim in the fall of 1996 merely because the answer had mentioned the Eleventh Amendment.

limitations defense if a dismissed state law claim were refiled within thirty days. (See Pet. Br. 17-18).

III. SECTION 1367(d) RESOLVES A SERIOUS CONSTITUTIONAL PROBLEM

A. Due Process

As we noted in our opening brief (Pet. Br. 45), the procedural morass created by state law prior to the enactment of section 1367(d) often violated due process. State law generally required (as it does today) that any federal litigant with a related state law claim include that claim in his or her federal action. If, however, the federal litigant complied, and the supplemental state claim were subsequently dismissed on procedural grounds, the plaintiff would often be barred by the statute of limitations from refiling in state court. The interaction of a state's claim preclusion rules and statute of limitations could prohibit a plaintiff from ever obtaining any hearing on the merits of his or her state law claim.

Procedural schemes such as this violate due process. "[A] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). Due process requires that a plaintiff be accorded a meaningful opportunity for a hearing on the merits of such a claim. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950). In *Logan* Illinois law required that an individual with a claim under the state employment discrimination statute file a charge with the state Fair Employment Practices Commission. The complainant could seek redress from the Commission, and, if dissatisfied by that agency's order, could obtain judicial review. But in that case Logan's right to redress had been forfeited because the Commission missed a

deadline for convening a conference of the parties. This Court held that this scheme violated due process.

> [I]t has become a truism that "some form of hearing" is required before the owner is finally deprived of a protected property interest . . . . Here . . . the state system itself . . . destroys a complainant's property interest, by operation of law . . . . Logan is challenging, not the Commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

455 U.S. at 433-36 (Emphasis in original).

Prior to 1990, in the absence of a state tolling rule, state law destroyed in a similar manner state law claims of federal litigants. The claimants were required to include those state claims in their federal complaints and, if the federal judge ultimately dismissed the state claims, state limitations law then barred them. The due process problem is all the more severe when a state claim is dismissed because a state defendant opts to invoke its sovereign immunity. In such cases the survival of the plaintiff's property interests turns not on the disinterested actions of a state administrative agency or a federal judge, but on the all too interested discretion of the defendant itself.

The university and several amici insist that the states have plenary authority to set the conditions under which they will waive sovereign immunity. But the result in *Logan* would assuredly have been the same if the defendant in question had been an Illinois state agency rather than a private employer. The conditions a state attaches to its waiver of immunity are limited by the Fourteenth Amendment. Minnesota could not condition its waiver on a showing that a plaintiff was white, or that she had contributed to the

governor's last campaign. Nor could it create a process for adjudicating claims against the state in which the state lawyers were allowed to introduce evidence and argument at a secret hearing from which a plaintiff was excluded, or in which the plaintiff and his or her attorney were forbidden to offer evidence of their own. Even facially neutral procedural rules are unconstitutional where, as in *Logan*, they operate in combination to deny a claimant due process.

The decision in *Logan* does not require that a claimant show to a legal certainty that there was no conceivable procedure under which he or she might have been able to obtain a hearing on the merits. Although there was a possibility that the plaintiff in *Logan* could have proceeded under another state law, it was at best "not clear" that he could do so. 455 U.S. at 435 n. 9. Such a "speculative . . . remedy" was inherently insufficient to solve the due process problem. *Id.*

In the instant case the United States suggests that plaintiffs might "seek to protect themselves" by filing simultaneous federal and state actions and asking for a stay of the latter. (U.S. Br. 31 n. 14). The United States does not, however, assert that either Minnesota or any other state would actually permit a plaintiff to maintain such a backup state lawsuit. The states' amicus brief suggests plaintiffs might attempt to proceed in both state and federal court, "subject to the inevitable procedural subtleties raised by interrelated dual proceedings." (States Amicus Br. p. 4). This is an artful way of acknowledging that either the federal or state courts might well forbid such simultaneous actions; it is entirely likely that the twenty-four attorneys general who in this Court offer this tactical suggestion would in the lower courts adamantly object if a plaintiff actually brought such duplicative proceedings. Several state organizations defend the concatenation of state claim preclusion and limitations rules as an ingenious method of reducing state expenses and

judicial workload[4]; this argument necessarily assumes that the states would save time and money because there would in practice be no way for plaintiffs to obtain a hearing.

Respondents argue that a plaintiff could solve the statute of limitations problem by filing a federal claim in federal court and a simultaneous state claim in state court. (R.Br. 5 n.4, 21). But such a tactic would run headlong into state law regarding claim preclusion, claim splitting, and election of remedies. In 1997 in this very case, when petitioners were attempting to pursue federal and state claims in federal and state courts, respectively, the university emphatically objected that Minnesota law forbade such a course of action. (Pet. Br. 7, 7n. 7). Claim preclusion principles would ordinarily prevent a plaintiff from obtaining hearings on a federal action in federal court and a state action in state court. If the federal action were resolved first, the state action would then be barred by res judicata, since the plaintiff would have failed to include the state claim in his or her federal action. For similar reasons, if the state action were resolved first, res judicata would bar the federal law claim.[5] We object, not to the possibility that plaintiffs may ultimately have to proceed in two forums, but to the absence of a clear procedure under which plaintiffs could do so without ultimately forfeiting one or the other of their claims.

The realities of litigation are that attorneys for state defendants have a formidable array of arguments--res judicata, claim splitting, election of remedies, sovereign

[4] Brief of the National Conference of State Legislatures, p. 26.

[5] The suggestion of the United States entails just this risk. If a plaintiff filed a precautionary state action, but the state court rejected a request that that lawsuit be stayed, the decision of the state court on the state claim, even if favorable, would bar further proceedings in the federal court, thus forfeiting the federal claim. That risk is particularly serious where, as here, only the federal court would afford the plaintiff a jury trial.

immunity, statutes of limitations--with which to defeat any tactic which a federal litigant might employ in an attempt to obtain a hearing on a state law claim. The brief signed by twenty-four state attorneys general refuses to relinquish any of these weapons. Although the brief invites this Court to assume that plaintiffs could simultaneously file their federal claims in federal court and their state claims in state court, not one of these attorneys general was willing to bind his or her state by including in the brief a representation that that tactic would indeed be legally permissible in his or her state[6]. The requirements of due process are not satisfied by a procedural shell game in which the hapless plaintiff is always told that he or she has chosen the wrong forum.[7]

[6] States Amicus Br. 21 argues:

> "Ordinary rules regarding claim preclusion, claim splitting, and election of remedies may bar plaintiffs from bifurcating actions brought against other private entities. It is far from clear, however, that those rules would apply when States are the defendants."

The states do not, however, adduce a single argument as to why they too could not invoke those same "ordinary rules" against a plaintiff. That failure is undoubtedly deliberate; the assertion of any such argument in this Court could preclude the signatory attorneys general from invoking those ordinary rules in lower court litigation. In any event, such a lack of clarity is fatal under *Ingram*.

[7] As Justice Rutledge noted in *Marino v. Ragen*, 332 U.S. 561 (1947)(concurring opinion), the opportunity to a judicial hearing is not satisfied by "a procedural morass" in which it is likely that "the case will go off on the procedural ruling that the wrong one of several possible remedies have been followed." 332 U.S. at 564-65. The right to a hearing is denied if "no remedy exists, or . . . every remedy is so limited as to be inadequate, or . . . the procedural problem of selecting the proper one is [too] difficult." 332 U.S. at 569-70. No meaningful opportunity to be heard is afforded if "at the outset a petitioner cannot intelligently select the proper way." *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*quoting* Justice Rutledge's opinion in *Marino*.)

As we explain below, the limited impact of section 1367(d) does not constitute an abrogation of a state's sovereign immunity. Even if this Court should conclude otherwise, section 1367(d) is a congruent and proportional response to the due process problem posed by state law. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001). No party questions the very real procedural dilemma faced by federal judges prior to the enactment of section 1367(d). Outside of the states with tolling statutes, federal plaintiffs whose supplemental claims were dismissed were likely to be denied a state court hearing (and, thus, any hearing at all) on the merits of those claims. Congress was not obligated to defer legislative action because of the speculative possibility--unrealized to this day--that states without tolling statutes would eventually fashion some other clear and certain method for obtaining a hearing on state claims related to a federal law claim in federal court.

Section 1367(d) applies only to state claims that were in fact brought first in federal court, and will have little if any effect on states that have solved the due process problem by adopting their own tolling statutes. Section 1367(d) requires that the supplemental claim have been filed in federal court within the deadline proscribed by state law; it tolls the limitations period, but does not revive claims already time-barred when the federal suit was begun. If it wishes to do so, a state can reduce the tolling period to no more than a few weeks by the simple expedient of immediately filing a motion to dismiss the supplemental claim on grounds of sovereign immunity.

B. Unconstitutional Condition

Absent tolling, a federal claimant can at least ordinarily be precluded at the whim of the defendant from getting any hearing for a state law claim against a state agency.

Respondent suggests that such a prohibition is nonetheless constitutional, because plaintiffs can still obtain a hearing for those state claims if they will relinquish their right to bring their federal claims in federal court. As we noted in our opening brief, such a proposed alternative imposes an unconstitutional condition on the state's waiver of sovereign immunity.

An individual's right to seek redress in the federal courts is protected by the First Amendment[8]. Litigants forced to relinquish litigation of civil rights claims in federal court would often lose their Seventh Amendment right to trial by jury; Minnesota, for example, provides no comparable right in civil actions. *Compare* 42 U.S.C. § 1981a(c) *with* Minn. Stat. § 363.14(2). Federal civil rights laws generally guarantee plaintiffs the right to sue in federal court; state interference with that right would violate the Supremacy Clause.

In *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967), this Court invalidated under the Supremacy Clause a similar form of interference with claims under the NLRA. In that case Florida had denied unemployment compensation to a worker because she had filed a charge with the NLRB.

> The National Labor Relations Act . . . is of course the law of the land which no state law can modify or repeal. . . . [C]oercive actions which the Act forbids employers . . . to take are likewise prohibited from being taken by the states. The action of Florida here, like the coercive actions which employers . . . are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people

[8] *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); *In re Primus*, 436 U.S. 412 (1978); *Brotherhood of R.R.Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

free to make charges of unfair labor practices to the Board.

389 U.S. at 239.

Minnesota could not condition state benefits on a recipient's agreement to forgo bringing any lawsuits in federal court. The University of Minnesota could not, for example, dismiss petitioners because they sued the university in federal court, or strip students of their scholarships for having done so. Similarly, although the state is under no obligation to waive its sovereign immunity, it cannot limit such waivers to plaintiffs who had contributed to the governor's reelection campaign, see *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717-18 (1996), or who had permitted the state to build bike pathways on their land. See *Bolan v. City of Tigard*, 512 U.S. 374 (1994). No state could include in its waiver statute a provision that "Any person who files in federal court any civil action shall forfeit any state law claim arising out of the same transaction or occurrence." In the absence of some tolling provision, the practical effect of state law is often essentially the same.

IV. SECTION 1367(d) APPLIES TO STATE DEFENDANTS

A. Section 1367(d) Should Be Presumed To Apply Where Needed To Avoid A Serious Constitutional Problem

"[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). That rule

of construction supports interpreting section 1367(d) to apply to claims against state defendants.

As we explained above, absent the application of section 1367(d) there would indeed be serious constitutional problems in states without their own tolling provisions. Although the new constitutional arguments advanced by respondents are not frivolous, the constitutional requirements of *Logan* and *Nash* are already well established. It would make no sense to adopt a construction of section 1367(d) that would assuredly lead to a violation of the due process rights of plaintiffs in order to avoid deciding whether the alternative construction might not violate the constitutionally protected immunity of the states. The fundamental purpose of the rule of construction in *DeBartolo* is to protect constitutional values, not to simplify opinion writing.

The circumstances of this case present some tension between the rights of due process and freedom of speech guaranteed by the Fourteenth Amendment, and the autonomy of the states implicitly protected in certain respects by the Constitution. Faced with such a possible conflict, the United States appears to support a rule of construction that would attach the highest priority to assuring that states' rights remain sacrosanct. That may be a fair reading of the priorities underlying the Constitution when it was originally ratified, but in adopting the Reconstruction Amendments the nation rewrote the constitutional priorities to give primacy to the protection of individual rights.

B. Section 1367(d) Is Not Limited To Dismissals Under Section 1367(c)

The terms of section 1367(d) state that its tolling provision applies to "any claim asserted under subsection (a)". (Emphasis added). The United States urges this Court to disregard the literal language of section 1367(d), and to

limit its application to supplemental claims that were dismissed "under section 1367" or, even more narrowly, to those that were dismissed under section 1367(c). It is difficult to understand how either proposed interpretation of section 1367(d) can be reconciled with the government's insistence that that tolling provision would indeed apply to a state that had temporarily consented to the exercise of federal jurisdiction. (U.S.Br. 18).

The government asserts, first, that section 1367(d) could not possibly apply, as written, to "any claim asserted under subsection (a)". The United States relies for this premise on a single sentence excerpted from a lengthy attachment to one of dozens of letters buried in a 400 page printed appendix to the House Hearings[9]. The government offers no reason to believe that any member of Congress had ever even read the document in question. This Court has never regarded such peripheral elements of a congressional hearing as sufficient to overcome the actual language of a statute.[10]

The United States and respondents rely heavily on a sentence in the House Report stating that subsection (d) provides tolling for claims "dismissed under this section." (H.R.Rep. 101-734, p. 30). That sentence might in isolation support a narrow reading of subsection (d), although by itself

[9] The documentary appendix consumes the majority of the printed hearings. The author of the letter involved did not testify at the actual hearing.

[10] The passage quoted by the United States does not, as it suggests, mean that the tolling provision would not apply to a dismissal of the supplemental claim on the merits. It states, not that the pleader could never refile in state court, but only that subsection (d) would not "give the pleader a second chance that the pleader would not ordinarily have under state law." House Hearing, 695, 697 (Emphasis added). The evident meaning of this remark is only that the tolling provision would not alter the res judicata effect in state court of the federal judge's decision on the merits.

this would be far too little to overcome the actual language of the statute. But the very next sentence of the Report describes section 1367(d) in broader terms. "The purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal court." (*Id.*). That purpose is implicated when a state law claim is dismissed for any reason, and thus supports a literal interpretation of section 1367(d).

An early draft of subsection (d) expressly limited tolling to supplemental claims dismissed under subsections (a) and (c). In framing the final version, however, Congress deliberately deleted this limitation. The United States urges the Court to read the omitted limitation back into the statute. Because the legislative history is silent about this deletion, the government argues, Congress could not have meant the change in the statutory language to entail a change in the meaning of the law. (U.S. Br. 22). The normal rule of construction, however, is that the rejection of such limiting language bespeaks a rejection, not an endorsement, of the limitation in question.

Even if subsection (d) were limited to dismissals under section 1367, it would still apply in this case. As the government correctly acknowledges, dismissal "under section 1367" would encompass dismissals under subsection (a). Although section 1367(a) does not exclude all claims against state agencies, it does not encompass a supplemental claim against a state which has asserted its sovereign immunity. (See U.S. Br. 14-15). Thus in a case such as this, petitioners' supplemental claim was within the scope of section 1367(a) when the complaint was first filed, but was no longer authorized by subsection (a) once the university filed its motion to dismiss the claim on sovereign immunity grounds. The dismissal of a claim on that basis would indeed be a dismissal under section 1367 itself.

After repeatedly arguing that section 1367(d) applies to any dismissal under section 1367 as a whole, the United States inexplicably changes position and announces that the "better" view is that section 1367(d) actually applies only to dismissals under subsection (c). (U.S. Br. 29). That interpretation would, of course, be at odds with even the government's reading of the House Report, and would be narrower than even the early draft of section 1367(d) itself. For this preferred interpretation the United States relies on neither the text or the legislative history of section 1367(d), resting instead primarily on a single footnote in the 2001 pamphlet supplement to volume 13B of Wright's Federal Practice and Procedure. (U.S.Br. 27).

Limiting section 1367(d) in this manner would have several implausible consequences. First, it would bar tolling where the state claim was dismissed because the court concluded it did not derive from the same common nucleus of operative fact as the federal claim, a frequent and often hotly disputed issue regarding supplemental claims. Second, it would bar tolling where the underlying federal claim was ultimately dismissed for lack of subject matter jurisdiction. In either situation the framing of the original complaint would often have been entirely reasonable, and in the first situation inclusion of the state claim may have been a necessary precaution to avoid a claim preclusion argument in state court. Third, if the reason for the dismissal controlled the availability of tolling, the federal court could assure tolling by expressly relying on subsection (c) in its order of dismissal. The parties would attempt to affect the tolling issue by persuading the court to adopt a particular reason, and a later state court might have to divine the reasoning behind an unexplained federal dismissal order. In the instant case, for example, dismissal of the supplemental claim clearly would have been warranted under section 1367(c)(3), which authorizes dismissal when the underlying federal claim has

been dismissed, and the district court order of dismissal does not contain any clear statement of reasons.

V. APPLICATION OF SECTION 1367(d) TO A STATE DEFENDANT DOES NOT CONSTITUTE AN ABROGATION OF STATE IMMUNITY

The abrogation issue raised by this case is a narrow one. Respondents apparently do not argue that any federal law which might affect the outcome of an action against a state agency would constitute abrogation of state sovereign immunity. We do not contend that Congress has the plenary authority to rewrite the terms of a state's waiver of sovereign immunity. The issue here is whether the specific impact of section 1367(d) was so grave as to amount to abrogation.

The aspect of Minnesota practice affected by section 1367(d) is tolling. The period of time set out in a statute of limitations is not by itself sufficient to determine if an action is timely. A court must also consider laws, precedents or rules regarding when such a period begins to run, under what circumstances (e.g. incapacity) it is tolled, and what the plaintiff must do (e.g. serve or file the complaint) before the expiration of that period. In this case Congress has not enacted a different time period (e.g. 90 rather than 45 days), but a tolling rule.

In Minnesota equitable tolling is a creature of precedent and inherent judicial authority; no state statute creates or regulates the standard for such tolling. The state Supreme Court below held that whether the limitations period should have been tolled was a matter in the discretion of Hennepin County District Judge Cara Neville. It did not hold that tolling was impermissible under state law, but concluded only that Judge Neville had not abused her discretion in refusing to toll the limitations period in this case. (Pet. App. A14-A15).

A. Application of Minnesota Tolling Practice Is Not A Condition of the State's Waiver of Immunity

Respondents insist that abrogation of a state's sovereign immunity would occur if section 1367(d) overturned a specific condition that was part of a state's waiver statute. (R.Br. 14). But the waiver statute in this case, the Minnesota Human Rights Act, does not itself contain any condition regarding tolling of the 45 day period. The state law does not provide, as a condition of the waiver, that there must not (or should) be equitable tolling in this or any other case. Tolling simply is not mentioned in the statute at all.

The specific conditions expressly imposed in a state waiver statute, and perhaps presumptively entitled to protection by a state's sovereign immunity, must be distinguished from the great body of evolving state law that may affect the outcome of a particular action against the state. When a legislature concludes that some limitation (such as a bar to punitive damages) is of such importance that it should be an express condition of a waiver, it places that restriction in the waiver law itself. But the MHRA did not somehow freeze, and then incorporate by reference as a condition of its enactment, the entire corpus of state procedural, evidentiary and remedial statutes, caselaw and rules as they happened to exist when the MHRA was enacted in 1955.

It makes even less sense to assert that Judge Neville's 1999 denial of tolling was a condition of the 1955 legislation. The Minnesota legislature could not have foreseen how Judge Neville would act 44 years later, or have somehow intended that her later ruling would be a condition of the waiver in the MHRA. Judge Neville's decision rested on the mistaken belief that *Pennhurst II* stripped federal courts of subject matter jurisdiction over any state law claims against a state[11].

[11] Appendix, Brief for Petitioners, p. B 10.

Had Judge Neville exercised her discretion to permit equitable tolling, that would have been equally consistent with the terms of the MHRA, and would undoubtedly have been upheld under the deferential standard of review applied by the state Supreme Court.

B. The Impact of Section 1367(d) Is Too Limited To Constitute An Infringement on State Sovereign Immunity

The states' amicus brief correctly observes that a state's sovereign immunity would be abrogated by a federal law which, by authorizing damage or other actions against a nonconsenting state, threatened its "financial integrity" or interfered with its "autonomy" or "decisionmaking ability." (States Amicus Br. 9, *quoting Alden v. Maine*, 527 U.S. 706, 750 (1999). Thus, the states assert, abrogation would occur if federal law required a state to defend old cases "in which the search for truth may be seriously impaired by the loss of evidence" (States Amicus Br. 11, *quoting United States v. Kubrick*, 444 U.S. 111, 117 (1979)), or lifted a statutory cap on the damages that could be awarded against a state. (States Amicus Br. 12).

That is a fair description of what might constitute the abrogation of a state's immunity; clearly, however, that standard is not met here. Permitting federal litigants to first attempt to bring state claims in federal court, and protecting those efforts with a tolling provision, does not expose a state to any liability that would not exist under state law if the litigant had sued directly in state court. Petitioners cannot, by reason of section 1367(d), collect a single dollar more than they might have won had they in August 1996 sued in Hennepin County District Court rather than federal district court. In the federal proceeding the parties promptly engaged in discovery; there is no claim that the timing of the later state

suit resulted in any loss of evidence. To the contrary, once that suit was filed, the university successfully fought for sixteen months to prevent the state action from going forward. (Pet. Br. 7-8).

In Minnesota, as in most states, only the state legislature has the authority to waive the state's sovereign immunity. Yet the Minnesota Supreme Court concluded in this case that a state trial judge, even without any express statutory authorization, had discretion to toll the 45 day limitation period in the MHRA. If judicial tolling does not (because it could not) constitute a waiver of a state's immunity, the limited tolling provision of section 1367(d) cannot be fairly said to have abrogated that immunity.

Respectfully submitted,

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